APPENDIX A.

Information.

COUNT I.

The United States Attorney Charges:—

That during the calendar year 1952, BENJAMIN N. LITMAN, who was a resident of the City of Philadelphia, State of Pennsylvania, had and received a gross income of $90,791.83; that on or about March 14, 1953, through his authorized representative, he had requested an extension of time for filing his income tax return for the calendar year 1952, and pursuant thereto was granted, in the manner provided by law and regulations, an extension of time until June 15, 1953; that on or about June 13, 1953, through his authorized representative, he had requested an extension of time for filing his income tax return for the calendar year 1952, and pursuant thereto was granted, in the manner provided by law and regulations, an extension of time until August 15, 1953; that on or about August 13, 1953, through his authorized representative, he had requested a further extension of time for filing his income tax return for the calendar year 1952, and pursuant thereto was granted, in the manner provided by law and regulations, an extension of time until September 15, 1953; that by reason of such income and said extensions of time he was required by law and regulations, after the close of the calendar year 1952 and on or before September 15, 1953, to make an income tax return to the Director of Internal Revenue in the Eastern District of Pennsylvania, stating specifically the items of his gross income and any deductions and credits to which he was entitled; that well knowing all of the foregoing facts, he did wilfully and knowingly fail to make said income tax return at the time required by law and

regulations to the said Director of Internal Revenue or to any other proper officer of the United States.

In violation of Section 145(a), Internal Revenue Code of 1939; 26 U. S. C., Section 145(a).

COUNT II.

And the United States Attorney Further Charges:—

That during the calendar year 1953, BENJAMIN N. LITMAN, who was a resident of the City of Philadelphia, State of Pennsylvania, had and received a gross income of $81,856.81; that on or about March 13, 1954, through his authorized representative, he had requested an extension of time for filing his income tax return for the calendar years 1953, and pursuant thereto was granted, in the manner provided by law and regulations, an extension of time until June 15, 1954; that on or about June 14, 1954, through his authorized representative, he had requested an extension of time for filing his income tax return for the calendar year 1953, and pursuant thereto was granted, in the manner provided by law and regulations, an extension of time until August 15, 1954; that on or about August 13, 1954, through his authorized representative, he had requested an extension of time for filing his income tax return for the calendar year 1953, and pursuant thereto was granted, in the manner provided by law and regulations, an extension of time until September 15, 1954; that by reason of such income and said extensions of time he was required by law and regulations, after the close of the calendar year 1953 and on or before September 15, 1954, to make an income tax return to the Director of Internal Revenue in the Eastern District of Pennsylvania, stating specifically the items of his gross income and any deductions and credits to which he was entitled; that well knowing all of the foregoing facts, he did wilfully and knowingly fail to make said income tax return at the time required by law and regulations to the

said Director of Internal Revenue or to any other proper officer of the United States.

In violation of Section 145(a), Internal Revenue Code of 1939; 26 U. S. C., Section 145(a).

COUNT III.

And the United States Attorney Further Charges:—

That during the calendar year 1954, BENJAMIN N. LITMAN, who was a resident of the City of Philadelphia, State of Pennsylvania, had and received a gross income of $91,281.96; that on or about April 15, 1955, through his authorized representative, he had requested an extension of time for filing his income tax return for the calendar year 1954, and pursuant thereto was granted, in the manner provided by law and regulations, an extension of time until July 15, 1955; that on or about July 14, 1955, through his authorized representative, he had requested an extension of time for filing his income tax return for the calendar year 1954, and pursuant thereto was granted, in the manner provided by law and regulations, an extension of time until August 15, 1955; that on or about August 15, 1955, through his authorized representative, he had requested an extension of time for filing his income tax return for the calendar year 1954, and pursuant thereto was granted, in the manner provided by law and regulations, an extension of time until September 15, 1955; that on or about September 15, 1955, through his authorized representative, he had requested an extension of time for filing his income tax return for the calendar year 1954, and pursuant thereto was granted, in the manner provided by law and regulations, an extension of time until October 15, 1955; that by reason of such income and said extensions of time he was required by law and regulations, after the close of the calendar year 1954 and on or before October 15, 1955, to make an income tax return to the Director of Internal Revenue in the Eastern

District of Pennsylvania, stating specifically the items of his gross income and any deductions and credits to which he was entitled; that well knowing all of the foregoing facts, he did wilfully and knowingly fail to make said income tax return at the time required by law and regulations to the said Director of Internal Revenue or to any other proper officer of the United States.

In violation of Section 7203, Internal Revenue Code; 26 U. S. C., Section 7203.

W. WILSON WHITE,
United States Attorney.

UNITED STATES OF AMERICA
EASTERN DISTRICT OF PENNSYLVANIA } *ss.:*

Special Agent William F. Lynn, Jr., being duly sworn according to law, deposes and says that he is the Special Agent in the Office of the District Director, Intelligence Division, Internal Revenue Service, Philadelphia, who made the investigation of Benjamin N. Litman and that the facts set forth in the foregoing Information are true and correct to the best of his knowledge, information and belief.

/s/ WILLIAM F. LYNN, JR.

Sworn to and subscribed before me this 13th day of September, 1956.

/s/ J. A. COMEY,
Deputy Clerk, U. S. District Court for the Eastern District of Pennsylvania.

APPENDIX B.

APPEAL FROM THE UNITED STATES DISTRICT COURT FOR THE EASTERN DISTRICT OF PENNSYLVANIA

Argued April 18, 1957

Before BIGGS, *Chief Judge*, and GOODRICH and HASTIE, *Circuit Judges*.

Opinion of the Court

(Filed July 8, 1957)

HASTIE, *Circuit Judge*.

A jury has found appellant guilty of the crime of knowingly and willfully failing to make income tax returns at the times required by law for the years 1952, 1953 and 1954. Appealing this conviction, he urges, first, that the court should have entered a judgment of acquittal because willfulness within the meaning of the statute[1] was not proved and, second, that the trial judge committed fundamental error in his charge.

The defendant is a physician whose income is derived principally from the ownership and operation of a small private hospital. No income tax returns were filed by him for the years 1952, 1953 and 1954 until March 16, 1956.

1. 26 U. S. C. § 145(a) is the controlling provision of the Internal Revenue Code of 1939, and, as to 1954, 26 U. S. C. § 7203. Both of these sections provide: "Any person required under this chapter to pay any estimated tax or tax, or required by law or regulations made under authority thereof to make a return or declaration, . . . who wilfully fails to . . . make such return or declaration, . . . at the time or times required by law or regulations, shall, in addition to other penalties provided by law, be guilty of a misdemeanor and, upon conviction thereof, be fined not more than $10,000. or imprisoned for not more than one year, or both, together with the costs of prosecution."

Three extensions of time, aggregating the six-month legal maximum, had been granted postponing the required filing of the 1952 return until September 15, 1953. Similarly, extensions of time for filing the 1953 return postponed the due date until September 15, 1954. The 1954 return was not in default until October 16, 1955, as a result of similar extensions of time. These extensions were requested for the defendant by his accountant and the reasons given each year were that the accountant was ill and overburdened with work.

These explanations are to be contrasted with those offered by the defendant himself in writing and by his accountant orally in the spring of 1955, shortly after the defendant was notified by the Internal Revenue Service that it was investigating his failure to file returns. The excuses then given were that essential records could not be found after a dishonest bookkeeper had left defendant's employ, and that defendant—not the accountant this time—had been ill. Indeed, according to the defendant's 1955 story, the lost records had just been found, and the preparation of the returns was about to go forward.

When this case came on for trial only the accountant, other than character witnesses, testified for the defense. He then stated that he had discovered that records essential to the preparation of defendant's returns were missing in January 1954, and that he himself had found them more than a year later, in May 1955, mixed in with some of the defendant's medical records. The defendant is not shown as assisting in the search until he joined the accountant in looking for the records on one day in October 1954. Even this is somewhat at odds with testimony of a revenue agent that the defendant told him of beginning the seach for the missing records in December 1954, nearly a year after the date of discovery of loss as stated by the accountant.

The accountant also testified that the 1952 records of defendant's cash receipts and disbursements were incomplete and that as early as 1953 he undertook to instruct

defendant's changing clerical helpers in the proper procedures of record keeping. He characterized successive clerical employees of the defendant as "incompetent".

We think this evidence gave the jury an adequate basis for a finding that the defendant's failure to file income tax returns when due was "willfull" in that the omission was advertent and motivated by the bad purpose of preventing the government from receiving returns at the time required by law. To begin with, the delay in filing was great and persistent over three consecutive taxable years. Such a pattern of behavior, as distinguished from a single occurrence, itself suggests willfulness. Next, the excuses given to support requests for extensions of filing time were quite different from those given later to cover the same periods of delinquency. Moreover, on the defendant's own statement a very damaging inference could reasonably be drawn from the fact that financial records, which allegedly could not be found for a year and a half, appeared very quickly among defendant's medical papers after an official inquiry was announced. Along the same line, the jury may well have considered it revealing that the accountant complained to the defendant of inadequate records as early as his 1953 attempt to prepare a 1952 return, but did not receive adequate data until about the time the Internal Revenue Service instituted its 1955 investigation. There was enough here to justify the jury in concluding that the defendant intentionally persisted in a course calculated to avoid or to disable himself from supplying his accountant with information appropriate and adequate for preparing his tax returns until the danger of governmental action became obvious and imminent. Since the evidence invited these inferences and defendant offered nothing to counteract them we think he is now in no position to complain that the jury was persuaded that he acted with bad purpose, intending not to fulfill the obligation of timely filing of which he was well aware.

"Punctuality is important to the fiscal system; and these are sanctions to assure punctual as well as faithful performance of these duties." *Spies v. United States;* 1943, 317 U. S. 492, 496.

Defendant urges as a separate point that the trial judge committed plain and fundamental error in his charge defining the word "willful". The defense made no objection at the trial to this part of the charge, but reversal is now urged under claim of "plain error" within the meaning of Rule 52 (b) of the Federal Rules of Criminal Procedure.

The defendant reads the charge as failing to require bad intention as an essential element of willfulness. In the relevant part of the charge the judge told the jury that "willful" was the key word which they had to consider. The court went on to say:

> "The word 'willful' has a number of different meanings, depending upon the context with which it is used. As it is used in this statute with which we are dealing here today it means voluntary, purposeful, deliberate, and intentional as distinguished from accidental, inadvertent or negligent. Mere negligence or carelessness, even gross negligence, is not sufficient to constitute willfulness. This, of course, is a criminal proceeding, and the word 'willful' as used in this statute means an act done with a bad purpose or one done without justifiable excuse, or one done stubbornly, obstinately, perversely, or with a bad motive."

It is argued that the disjunctive "or" is so used in the last sentence of this quoted excerpt as to indicate that absence of legal justification, without regard for bad purpose, amounts to willfulness. *Cf. Yarborough v. United States,* 4th Cir. 1956, 230 F. 2d 56. But we think the arrangement of this sentence was of minimal significance in the light of the court's additional instructions which

rather clearly define the concept of bad purpose and require that the jury find a bad purpose in order to convict. Thus, the court said:

> "I charge you the only bad purpose or bad motive necessary for the Government to prove in this case, however, is the deliberate intention not to file returns which the defendant knew ought to be filed so the Government would not know the extent of his liability, so that is your problem, Ladies and Gentlemen, in a nutshell."[2]

Then, as the very last thing said to the jury, the court added:

> ". . . Now if you come to the conclusion the action, or lack of action, of this defendant in filing his returns was due to inadvertence or carelessness or negligence, even gross negligence, then you should acquit him. If, on the other hand, you are satisfied, beyond a reasonable doubt, that the defendant willfully failed to make these returns, with a bad purpose, of concealing from the Government the extent of his tax liability, then you should find him guilty."

In the light of the whole charge it is quite understandable that the single use of the particle "or", of which complaint is now made, did not impress counsel at the time as sufficiently misleading to require correction. We are satisfied that the charge as a whole did not convey the impression which the defendant now attributes to it. There was no fundamental error requiring correction in the absence of timely objection.

The judgment will be affirmed.

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2. Compare the statement of the Supreme Court in *Spies v. United States*, 1943, 317 U. S. 492, 497-8, that the concept of willfulness "may well mean something more as applied to nonpayment of tax than when applied to failure to make a return. Mere voluntary and purposeful, as distinguished from accidental omission to make a timely return might meet the test of willfulness."

APPENDIX C.

IN THE
UNITED STATES COURT OF APPEALS
FOR THE THIRD CIRCUIT.

No. 12,152.

UNITED STATES OF AMERICA

v.

BENJAMIN N. LITMAN,
Appellant.

ON APPEAL FROM THE UNITED STATES DISTRICT COURT
FOR THE EASTERN DISTRICT OF PENNSYLVANIA.

Present: BIGGS, *Chief Judge*, and GOODRICH and HASTIE, *Circuit Judges.*

Judgment.

This cause came on to be heard on the record from the United States District Court for the Eastern District of Pennsylvania and was argued by counsel.

On consideration whereof, it is now here ordered and adjudged by this Court that the judgment of the said District Court in this case be, and the same is hereby affirmed.

Attest:

IDA O. CRESKOFF,
Clerk.

July 8, 1957.

APPENDIX D.

IN THE
UNITED STATES COURT OF APPEALS
FOR THE THIRD CIRCUIT.

No. 12,152.

UNITED STATES OF AMERICA

v.

BENJAMIN N. LITMAN,
Appellee.

Order Denying Petition for Rehearing.

Present: BIGGS, *Chief Judge*, and GOODRICH and HASTIE, *Circuit Judges.*

After due consideration the petition for rehearing in the above-entitled case is hereby denied.

By The Court,

/s/ WILLIAM H. HASTIE,
Circuit Judge.

Dated: August 6, 1957.